FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 06-083796

Employee: John Shelton

Employer: Delmar Gardens

Insurer: Travelers Insurance Company

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by section 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to section 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated November 25, 2009, and awards no compensation in the above-captioned case.

The award and decision of Administrative Law Judge Joseph E. Denigan, issued November 25, 2009, is attached and incorporated by this reference.

Given at Jefferson City, State of Missouri, this 24th day of June 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

Law

Employer/insurer bears the burden of proving that employee forfeited his benefits. "The burden of establishing any affirmative defense is on the employer…In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true." § 287.808 RSMo.

Section 287.120.6(3) RSMo provides, in relevant part:

> An employee's refusal to take a test for alcohol or a nonprescribed controlled substance, as defined by section 195.010, RSMo, at the request of the employer shall result in the forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a nonprescribed controlled substance by the claimant or if the employer's policy clearly authorizes post-injury testing.

We must construe the above provision strictly. See § 287.800.1 RSMo.

Employer argues that forfeiture is appropriate under § 287.120.6(3) because employer's policy clearly authorized post-injury testing and employee refused to take a test for alcohol.

Discussion

Did employer's policy clearly authorize post-injury testing?

The language of employer's drug and alcohol policy relating to post-injury testing appears in the pre-printed attestation above employee's signature on an undated document entitled *Notice to Employees of Delmar Gardens Enterprises, Inc*. The attestation reads, in relevant part, "I understand that if in the event I am injured while on the job, I will be subject to a drug and/or alcohol test *upon receiving treatment*." (Emphasis added.)

Jessica Hayes, employer's assistant administrator and human resources director, explained the policy: "When an employee is hurt or injured on the job they are required to submit to a breath alcohol, and drug screen *upon treatment at our medical center*. And if they do refuse or do not submit to that they are subject to termination." (Emphasis added.)

Jeanna Woods, employer's administrator, described employer's post-injury alcohol and drug test policy, too. "Whatever day they go for *medical treatment* they have to submit to that test." (Emphasis added.)

A careful reader will note that the plain language of the policy makes employee's obligation to submit to a drug and/or alcohol test contingent upon employee receiving medical treatment. The testimony of employer's human resources director goes further and makes employee's obligation to submit to a drug and/or alcohol test contingent upon employee receiving treatment from employer's authorized medical provider.

The fly in the ointment of employer's forfeiture argument is that the Missouri Workers' Compensation Law imposes no duty upon employee to accept treatment from employer's medical provider. Employee has an absolute right to choose his own physicians. Section 287.140 RSMo, plainly states that, "[i]f the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense."

In summary, employer's policy only required employee to submit to alcohol or drug testing if employee accepted treatment from the medical providers chosen by employer. Employee chose his own physician and accepted that he would have to pay for the medical expenses associated with that treatment. Employer's policy did not unequivocally and clearly mandate that employee submit to post-injury alcohol and drug testing under the circumstances of this case.

Did employer request that employee take a test for alcohol or nonprescribed controlled substance?

There is no evidence that employer ever requested that employee take a test for alcohol or nonprescribed controlled substances. No witness testified to asking employee to take an alcohol or drug test. No medical records reflect any such request. The only evidence regarding a test is the following statement appearing in an August 21, 2006, letter from Dayetra Sloan of Concentra to employer: "When [employee] finally came inside we took him in the back for his Breath Alcohol Test and he refused all *treatment*." (Emphasis added). Ms. Sloan did not record that she asked employee to submit to any test.

The absence of any evidence of a request by employer that employee take a drug or alcohol test is fatal to employer's argument that forfeiture is appropriate in this matter.

Did employee refuse to take a test for alcohol or nonprescribed controlled substance?

There is no evidence in the record that employee refused to take a test for alcohol or drugs. The only evidence regarding a test is the following statement appearing in an August 21, 2006, letter from Dayetra Sloan of Concentra to employer: "When [employee] finally came inside we took him in the back for his Breath Alcohol Test and he refused all *treatment*." (Emphasis added).

All that Ms. Sloan asserts is that employee refused treatment. Employee concedes as much. Unless it is conducted for the purpose of determining the appropriate course of medical service to provide, a test for the presence of alcohol is not "treatment." "Treat" means, "to care for (as a patient or part of the body) medically or surgically: deal with by

medical or surgical means: give a medical treatment to…: to seek cure or relief of (as a disease)." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2435 (2002).

Examinations conducted merely to allow the employer to determine questions of causality or liability generally do not constitute "medical treatment." *Faries v. ACF Industries, Inc.,* 531 S.W.2d 93, 97 (Mo. App. 1975). See also, *Meekins v. St. John's Reg'l Health Ctr., Inc.*, 149 S.W.3d 525 (Mo. App. 2004) (drug screen is not medical treatment).

Employer has proven employee refused treatment. Employer has failed to establish employee refused to participate in an alcohol test. The forfeiture provision of § 287.120.6(3) is not triggered in this case.

Records of the Division of Employment Security
Employer/insurer offered as evidence *some* records of a Division of Employment Security unemployment compensation case involving employee and employer. The records stop short of the evidentiary hearing and all subsequent proceedings. Employer/insurer's incomplete offer is explained by § 288.215 RSMo, which prohibits using decisions of the Appeals Tribunal and the Labor and Industrial Relations Commission as evidence in actions not brought under the Missouri Employment Security Law.

> 1. Any finding of fact, conclusion of law, judgment or order made by an appeals tribunal, the labor and industrial relations commission or any person with the authority to make findings of fact or law in any proceeding under this chapter shall not be conclusive or binding in any separate or subsequent action not brought under this chapter, and shall not be used as evidence in any subsequent or separate action not brought under this chapter, before an arbitrator, commissioner, commission, administrative law judge, judge or court of this state or of the United States, regardless of whether the prior action was between the same or related parties or involved the same facts.
>
> 2. Any finding of fact, conclusion of law, judgment or order made by an arbitrator, commissioner, commission, administrative law judge, judge or any other person or body with authority to make findings of fact or law in any proceeding not brought under this chapter shall not be binding or conclusive on an appeals tribunal or the labor and industrial relations commission in any subsequent or separate proceeding brought under this chapter, regardless of whether the prior action was between the same or related parties or involved the same facts.
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> 3. Nothing in subsection 1 of this section shall be construed to prevent the use of evidence presented in any proceeding under this chapter in any other proceeding not brought under this chapter.

There were further proceedings in the unemployment case that are not documented in the exhibits offered by the employer/insurer. Relying on the incomplete record of the proceedings in the unemployment case, the administrative law judge found that, "a certified copy of the Employment Security records were introduced into evidence and those contain a finding that the claimant refused to undergo alcohol testing and was terminated by the employer in connection with his misconduct in that regard." While the administrative law judge's description of one of the unemployment exhibits is accurate, the exhibit is not persuasive on the issue of whether claimant refused to undergo alcohol testing. The "finding" referenced by the administrative law judge was merely the determination of a Division of Employment Security deputy. Deputy determinations are the result of a preliminary investigation and are not based upon evidence presented in an evidentiary hearing. See § 288.070 RSMo.

Did employer violate § 287.128.3 RSMo?

Although not helpful to determining the refusal issue, the Division of Employment Security records raise one important issue. The records suggest that employer repeatedly misled employee about his rights under the Workers' Compensation Law. Section 287.140 RSMo, plainly states that, "[i]f the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense." Employer is not required to pay the medical bills associated with treatment an employee secures on his own. But an employee making such an election to treat with doctors of his own choosing does not forgo other benefits under the Law. Notwithstanding employee's clear right to choose his own physician, employer's representatives repeatedly told him he was required to seek treatment through employer's medical providers. Here's a sampling of some of the misstatements appearing in the records submitted by employer to the Division of Employment Security.

> Jeanna Woods – "I told him he must go to concentra!"
>
> Angela Harpole – "I counseled Mr. Shelton that he must attend Concentra Medical Center in order to receive paid workman's compensation by Delmar Gardens."
>
> "Mr. Shelton stated to me that he did not want to be seen at Concentra, and that he had already been seen by his own doctor. Again, I reminded Mr. Shelton that he had to be seen by a Concentra doctor in order to obtain paid workman's compensation. At this time he stated he would like to take sick days for the 12th thru 15th, and would return to work. In accordance with his own doctors' statement, I told him that he was on restricted duty and could not return to work on full duty and that Delmar Gardens would not honor paid light duty unless specified by a Concentra doctor. At this time again Mr. Shelton refused to see a Concentra doctor and agreed to take a week off of work for the time of restricted duty without pay."
>
> Jessica Kiene – "Mr. Shelton had hurt himself while working here at Delmar Gardens of Creve Couer. When an employee hurts himself while working they must go to our medical center to receive treatment. Mr. Shelton did not want to

> go to our medical center and went to his own doctor. We told Mr. Shelton that he needs to be seen by our medical center to receive Workers Compensation."

As discussed earlier, employee's right to workers' compensation benefits, with the exception of medical expenses, is not contingent on employee treating with a medical provider authorized by employer. But, according to employer's own records, Jeanna Woods and Angela Harpole both told employee he had to be treated at Concentra or employee could not receive workers' compensation benefits. And it appears employee may have not pursued temporary total disability benefits as a direct result of Angela Harpole's statements.

The 2005 amendments to the Missouri Workers' Compensation Law stripped away some of the protections previously afforded to injured workers. Before the changes, an employer had to conspicuously post its workplace drug and alcohol policies on its premises. Further, an employer had to prove that an injured worker had actual knowledge of the policy and that employer made a diligent effort to inform the worker of the need to obey the policy before the worker's violation could adversely affect his workers' compensation benefits. Gone are the requirements that the employer diligently post the rules and train workers about the rules. Gone, too, are the exceptions to forfeiture where an employer acquiesced in the drug or alcohol use.

It is one thing to relieve employer of the obligation to warn workers about forfeiture provisions in the law. It is quite another to condone affirmative misrepresentation of a worker's rights under the workers' compensation law. I will not do so.

Short of immediately hiring counsel, an injured worker is at the mercy of employer to provide him with accurate information about his rights because the legislature eliminated the legal advisors who were previously employed by the Division of Workers' Compensation to explain workers' compensation rights to injured workers.

Section 287.128.3 RSMo provides, in part:

> It shall be unlawful for any person to:
> …
>
> (6) Knowingly make or cause to be made any false or fraudulent material statement or material representation for the purpose of obtaining or denying any benefit;
>
> (7) Knowingly make or cause to be made any false or fraudulent statements with regard to entitlement to benefits with the intent to discourage an injured worker from making a legitimate claim;

I do not know if employer's administrator and her staff knew that the statements they made to employee were false at the time they made the statements. I do not know if employer's administrator and her staff made the statements for the purpose of denying any benefit to employee or with the intent to discourage employee from claiming

benefits to which he is entitled. I will give them the benefit of the doubt and assume they were unaware that their statements were contrary to the Workers' Compensation Law. I encourage administrative law judges to question employer witnesses to determine their level of knowledge where it appears an injured worker has been misled about his or her rights by the witness. In that way, instances of deliberate misinformation may be more easily identified for referral to the Division of Workers' Compensation's Fraud and Noncompliance Unit for investigation.

Compensation
Employer admits that employee sustained an injury by accident on August 9, 2006. Employer does not dispute that the injury arose out of and in the course of employment. Employee's injury is compensable and employee's benefits are not forfeited. I find credible the opinion of Dr. Berkin that employee sustained a permanent disability as a result of the August 9, 2006, accident. I would award to employee permanent partial disability benefits of 12.5% of the body as a whole referable to the low back.

I would reverse the administrative law judge's award. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

_____
John J. Hickey, Member

AWARD

Employee:	John Shelton	Injury No.: 06-083796
Dependents:	N/A	
Employer:	Delmar Gardens	Before the **DIVISION OF WORKERS' COMPENSATION** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	N/A	
Insurer:	Travelers Insurance Company	
Hearing Date:	September 14, 2009	Checked by: JED/ sr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: 08/09/06
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: N/A
12. Did accident or occupational disease cause death? N/A Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

17. Value necessary medical aid not furnished by employer/insurer? None

18. Employee's average weekly wages: $449.90

19. Weekly compensation rate: $299.94 / $299.94

20. Method wages computation: By stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: N/A

TOTAL: -0-

23. Future requirements awarded: N/A

Said payments to begin N/A and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

AWARD

Employee: John Shelton

Injury No.: 06-083796

Dependents: N/A

Employer: Delmar Gardens

Additional Party: N/A

Insurer: Travelers Insurance Company

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Hearing Date: September 14, 2009

Checked by: JED:sr

This matter involves two separate and disputed Claims for Compensation each involving the low back with the reported accident dates of August 9, 2006 (#06-083796) and August 14, 2006 (#06-083797). These cases may be referred to hereinafter as the first and second cases, respectively and chronologically. Both parties are represented by counsel.

Issues for Trial

Both Cases

1. Whether injury arose out of and in the course of employment.
2. Failure to take drug/alcohol testing pursuant to Section 287.120.6(3) RSMo (2005).
3. Nature and extent of permanent disability.

Second Case

4. Notice.
5. Accident.
6. Medical causation/Attribution.

FINDINGS OF FACT

The employer and insurer did not dispute that the employee sustained an accident and injury on 08/09/06 but are asserting that he has forfeited benefits under Section 287.120.6(3) for failure to comply with drug or alcohol testing.

The parties stipulated that no compensation had been paid and no medical expenses provided. The only claim being made was for permanent partial disability. The parties further

stipulated the average weekly wage of $449.90 and rates of $299.94 for both temporary total and permanent partial disability.

Claimant's Testimony

Mr. Shelton lifted a nursing home resident on 08/09/06 and sustained a back injury. He testified that he reported the matter to his supervisor that evening and a referral was made to Concentra Medical Centers for medical treatment. He, instead, started treatment with the Veterans Administration Hospital. The records of the Veterans Administration Hospital which were admitted into evidence did indicate a visit on 08/13/06 in which he reported low back pain related to lifting at work.

The claimant testified that when he reported the injury, he was referred to Concentra Medical Centers. He claims he was treated inappropriately at Concentra Medical Centers and he refused to be seen by them and refused to have testing for alcohol. He did suggest that he wasn't offered an alcohol test but was offered a drug test. He claimed he refused to undergo the test based on the manner in which he was treated at Concentra.

He testified that he then returned to work and sustained a new injury on or about 08/14/06 while lifting a resident. He testified that he reported the matter to his supervisor. However, the claimant was shown his deposition taken prior to trial and admitted that after reviewing the deposition, he may not have reported this to his supervisor.

Claimant testified that he was referred by the employer and insurer to Concentra Medical Centers. As identified in the records of Concentra Medical Centers, he was seen on 08/18/06. The claimant testified that he was treated inappropriately by the person in charge and that he therefore refused to be treated by them and refused to take a drug or alcohol test. The records of Concentra indicate that he smelled of alcohol and that he did refuse to take an alcohol test. In addition, a certified copy of the Employment Security records were introduced into evidence and those contain a finding that the claimant refused to undergo alcohol testing and was terminated by the employer in connection with his misconduct in that regard. The claimant denied at hearing that he had been drinking. He testified that he sought his own medical care at Veterans Administration Hospital and has been treated by them since the date of accident.

He currently complains of low back pain and takes Hydrocodone. He was terminated by Delmar Gardens on 08/21/06 but has found other employment. He did admit to having sustained a back injury while working at his current place of employment, Veterans Administration Hospital, and also having sustained a low back injury in a motor vehicle accident on an unspecified date since working at Delmar Gardens. He currently uses a cane, takes medication on a regular basis and is unable to engage in the activities that he did prior to 08/09/06.

He was examined at the request of his attorney by Dr. Shawn Berkin on two occasions, 12/05/06 and 09/17/07. At the first examination, the doctor did not believe he was at maximum medical improvement but diagnosed a lumbosacral strain pertaining to both injuries. When seen by Dr. Berkin on 09/17/07, he was diagnosed with the same condition and rated by Dr. Berkin as having disability of 25% of the body with an apportionment equally between the two injuries. He also found that Mr. Shelton had preexisting disability of 5% of the body related to the low

back due to a military service injury in 1968. Dr. Berkin failed to make attribution, if any, to subsequent injuries.

At the request of the employer and insurer, the claimant was examined by Dr. Marvin Mishkin. Dr. Mishkin's report was introduced into evidence and Dr. Mishkin found no evidence of permanent partial disability related to either accident. He did believe he had degenerative disc disease in the lumbar spine but not related to either accident. Dr. Mishkin noticed that he was uncooperative in the examination and constantly stated that he does not remember anything.

The employee's only medical treatment has been though the Veterans Administration Hospital other than for a visit to an emergency room for the residuals of a motor vehicle accident.

Jessica Hayes

On behalf of Employer, Jessica Hayes testified that she is the administrator of the Delmar Gardens location where Mr. Shelton worked. She was not familiar with the injury but did identify the personnel policy of Delmar Gardens that all employees are required to undergo drug/alcohol testing following a work related injury. This is applied regardless of whether the employee is suspected of having sustained a work related injury while under the influence of drugs or alcohol. She identified the document signed by Mr. Shelton at his time of employment indicating that he was aware of post-accident drug testing and that his benefits could be forfeited for refusal (Exhibit 6).

Jeanna Woods

Also testifying on behalf of the employer and insurer was Jeanna Woods. She recalled a conversation with Mr. Shelton on 08/12/06 which was documented in her file. Mr. Shelton contacted her to report having been injured in the shift the prior morning of 08/12/06. He was instructed to go to Missouri Baptist Hospital but indicated he would not do so as he did not have transportation. She subsequently discussed the injury with Mr. Shelton on 08/13/06 and advised him that he should go to Missouri Baptist Hospital or Concentra the following Monday, as Concentra was not open on weekends. Concentra is the authorized medical provider of the employer and insurer. The claimant indicated that he chose instead to go to his own doctor at Veterans Administration Hospital.

Non-Compliance with Drug Testing Section 287.120.6(3) RSMo

The employee did go to Concentra on 08/18/06. According to Mr. Shelton, he was treated rudely at that time. It was reported that Mr. Shelton refused to undergo alcohol testing. When the report was made to Delmar Gardens, they terminated him pursuant to their personnel policy.

Employers/Insurers Exhibit 3 consisted of the certified copy of the records of Concentra. The records indicate the employee smelled of alcohol and refused to undergo alcohol testing.

The employee applied for unemployment benefits and was denied benefits based on a finding that he had refused to undergo alcohol testing and therefore had engaged in post-injury misconduct.

Section 287.120.6(3) was amended effective 08/28/05 to provide that an employee's refusal to take a test for alcohol or a non-prescribed controlled substance, as defined by Section 195.010, RSMo, at the request of the employer shall result in a forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a non-prescribed controlled substance by the claimant or if the employer's policy clearly authorized post-injury testing.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, in the first case, Employer established its post-injury testing policy and there is no dispute that Claimant refused to undergo the testing. Employer had no requirement that the test be performed immediately following the injury but must be administered upon treatment. This case falls within the forfeiture provisions of Section 287.120.6(3) RSMo (2005). Claim denied. The remaining issues are moot.

Date: _____ Made by: _____

JOSEPH E. DENIGAN
Administrative Law Judge

A true copy: Attest:

_____

Division of Workers' Compensation

FINAL AWARD DENYING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

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Given at Jefferson City, State of Missouri, this 24th day of June 2010.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

William F. Ringer, Chairman

Alice A. Bartlett, Member

DISSENTING OPINION FILED
John J. Hickey, Member

Attest:

Secretary

DISSENTING OPINION

I have reviewed and considered all of the competent and substantial evidence on the whole record. Based upon my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the decision of the administrative law judge should be reversed.

Law

Employer/insurer bears the burden of proving that employee forfeited his benefits. "The burden of establishing any affirmative defense is on the employer…In asserting any claim or defense based on a factual proposition, the party asserting such claim or defense must establish that such proposition is more likely to be true than not true." § 287.808 RSMo.

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We must construe the above provision strictly. See § 287.800.1 RSMo.

Employer argues that forfeiture is appropriate under § 287.120.6(3) because employer's policy clearly authorized post-injury testing and employee refused to take a test for alcohol.

Discussion

Did employer's policy clearly authorize post-injury testing?

The language of employer's drug and alcohol policy relating to post-injury testing appears in the pre-printed attestation above employee's signature on an undated document entitled *Notice to Employees of Delmar Gardens Enterprises, Inc*. The attestation reads, in relevant part, "I understand that if in the event I am injured while on the job, I will be subject to a drug and/or alcohol test *upon receiving treatment*." (Emphasis added.)

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The fly in the ointment of employer's forfeiture argument is that the Missouri Workers' Compensation Law imposes no duty upon employee to accept treatment from employer's medical provider. Employee has an absolute right to choose his own physicians. Section 287.140 RSMo, plainly states that, "[i]f the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense."

In summary, employer's policy only required employee to submit to alcohol or drug testing if employee accepted treatment from the medical providers chosen by employer. Employee chose his own physician and accepted that he would have to pay for the medical expenses associated with that treatment. Employer's policy did not unequivocally and clearly mandate that employee submit to post-injury alcohol and drug testing under the circumstances of this case.

Did employer request that employee take a test for alcohol or nonprescribed controlled substance?

There is no evidence that employer ever requested that employee take a test for alcohol or nonprescribed controlled substances. No witness testified to asking employee to take an alcohol or drug test. No medical records reflect any such request. The only evidence regarding a test is the following statement appearing in an August 21, 2006, letter from Dayetra Sloan of Concentra to employer: "When [employee] finally came inside we took him in the back for his Breath Alcohol Test and he refused all *treatment*." (Emphasis added). Ms. Sloan did not record that she asked employee to submit to any test.

The absence of any evidence of a request by employer that employee take a drug or alcohol test is fatal to employer's argument that forfeiture is appropriate in this matter.

Did employee refuse to take a test for alcohol or nonprescribed controlled substance?

There is no evidence in the record that employee refused to take a test for alcohol or drugs. The only evidence regarding a test is the following statement appearing in an August 21, 2006, letter from Dayetra Sloan of Concentra to employer: "When [employee] finally came inside we took him in the back for his Breath Alcohol Test and he refused all *treatment*." (Emphasis added).

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Employer has proven employee refused treatment. Employer has failed to establish employee refused to participate in an alcohol test. The forfeiture provision of § 287.120.6(3) is not triggered in this case.

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There were further proceedings in the unemployment case that are not documented in the exhibits offered by the employer/insurer. Relying on the incomplete record of the proceedings in the unemployment case, the administrative law judge found that, "a certified copy of the Employment Security records were introduced into evidence and those contain a finding that the claimant refused to undergo alcohol testing and was terminated by the employer in connection with his misconduct in that regard." While the administrative law judge's description of one of the unemployment exhibits is accurate, the exhibit is not persuasive on the issue of whether claimant refused to undergo alcohol testing. The "finding" referenced by the administrative law judge was merely the determination of a Division of Employment Security deputy. Deputy determinations are the result of a preliminary investigation and are not based upon evidence presented in an evidentiary hearing. See § 288.070 RSMo.

Did employer violate § 287.128.3 RSMo?

Although not helpful to determining the refusal issue, the Division of Employment Security records raise one important issue. The records suggest that employer repeatedly misled employee about his rights under the Workers' Compensation Law. Section 287.140 RSMo, plainly states that, "[i]f the employee desires, he shall have the right to select his own physician, surgeon, or other such requirement at his own expense." Employer is not required to pay the medical bills associated with treatment an employee secures on his own. But an employee making such an election to treat with doctors of his own choosing does not forgo other benefits under the Law. Notwithstanding employee's clear right to choose his own physician, employer's representatives repeatedly told him he was required to seek treatment through employer's medical providers. Here's a sampling of some of the misstatements appearing in the records submitted by employer to the Division of Employment Security.

> Jeanna Woods – "I told him he must go to concentra!"
>
> Angela Harpole – "I counseled Mr. Shelton that he must attend Concentra Medical Center in order to receive paid workman's compensation by Delmar Gardens."
>
> "Mr. Shelton stated to me that he did not want to be seen at Concentra, and that he had already been seen by his own doctor. Again, I reminded Mr. Shelton that he had to be seen by a Concentra doctor in order to obtain paid workman's compensation. At this time he stated he would like to take sick days for the 12th thru 15th, and would return to work. In accordance with his own doctors' statement, I told him that he was on restricted duty and could not return to work on full duty and that Delmar Gardens would not honor paid light duty unless specified by a Concentra doctor. At this time again Mr. Shelton refused to see a Concentra doctor and agreed to take a week off of work for the time of restricted duty without pay."
>
> Jessica Kiene – "Mr. Shelton had hurt himself while working here at Delmar Gardens of Creve Couer. When an employee hurts himself while working they must go to our medical center to receive treatment. Mr. Shelton did not want to

> go to our medical center and went to his own doctor. We told Mr. Shelton that he needs to be seen by our medical center to receive Workers Compensation."

As discussed earlier, employee's right to workers' compensation benefits, with the exception of medical expenses, is not contingent on employee treating with a medical provider authorized by employer. But, according to employer's own records, Jeanna Woods and Angela Harpole both told employee he had to be treated at Concentra or employee could not receive workers' compensation benefits. And it appears employee may have not pursued temporary total disability benefits as a direct result of Angela Harpole's statements.

The 2005 amendments to the Missouri Workers' Compensation Law stripped away some of the protections previously afforded to injured workers. Before the changes, an employer had to conspicuously post its workplace drug and alcohol policies on its premises. Further, an employer had to prove that an injured worker had actual knowledge of the policy and that employer made a diligent effort to inform the worker of the need to obey the policy before the worker's violation could adversely affect his workers' compensation benefits. Gone are the requirements that the employer diligently post the rules and train workers about the rules. Gone, too, are the exceptions to forfeiture where an employer acquiesced in the drug or alcohol use.

It is one thing to relieve employer of the obligation to warn workers about forfeiture provisions in the law. It is quite another to condone affirmative misrepresentation of a worker's rights under the workers' compensation law. I will not do so.

Short of immediately hiring counsel, an injured worker is at the mercy of employer to provide him with accurate information about his rights because the legislature eliminated the legal advisors who were previously employed by the Division of Workers' Compensation to explain workers' compensation rights to injured workers.

Section 287.128.3 RSMo provides, in part:

> It shall be unlawful for any person to:
> …
>
> (6) Knowingly make or cause to be made any false or fraudulent material statement or material representation for the purpose of obtaining or denying any benefit;
>
> (7) Knowingly make or cause to be made any false or fraudulent statements with regard to entitlement to benefits with the intent to discourage an injured worker from making a legitimate claim;

I do not know if employer's administrator and her staff knew that the statements they made to employee were false at the time they made the statements. I do not know if employer's administrator and her staff made the statements for the purpose of denying any benefit to employee or with the intent to discourage employee from claiming

benefits to which he is entitled. I will give them the benefit of the doubt and assume they were unaware that their statements were contrary to the Workers' Compensation Law. I encourage administrative law judges to question employer witnesses to determine their level of knowledge where it appears an injured worker has been misled about his or her rights by the witness. In that way, instances of deliberate misinformation may be more easily identified for referral to the Division of Workers' Compensation's Fraud and Noncompliance Unit for investigation.

Compensation
Employee has established that he sustained an injury by accident on August 14, 2006, while transferring a resident. Employee's injury is compensable and employee's benefits are not forfeited. I find credible the opinion of Dr. Berkin that employee sustained a permanent disability as a result of the August 14, 2006, accident. I would award to employee permanent partial disability benefits of 12.5% of the body as a whole referable to the low back.

I would reverse the administrative law judge's award. For the foregoing reasons, I respectfully dissent from the decision of the majority of the Commission.

_____
John J. Hickey, Member

AWARD

Employee:	John Shelton	Injury No.: 06-083797
Dependents:	N/A	
Employer:	Delmar Gardens	Before the **DIVISION OF WORKERS' COMPENSATION** Department of Labor and Industrial Relations of Missouri Jefferson City, Missouri
Additional Party:	N/A	
Insurer:	Travelers Insurance Company	
Hearing Date:	September 14, 2009	Checked by: JED/ sr

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? No
2. Was the injury or occupational disease compensable under Chapter 287? No
3. Was there an accident or incident of occupational disease under the Law? No
4. Date of accident or onset of occupational disease: 08/14/06
5. State location where accident occurred or occupational disease was contracted: St. Louis County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? No
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted: N/A
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: N/A
14. Nature and extent of any permanent disability: N/A
15. Compensation paid to-date for temporary disability: None
16. Value necessary medical aid paid to date by employer/insurer? None

Employee: John Shelton Injury No.: 06-083797

17. Value necessary medical aid not furnished by employer/insurer? None

18. Employee's average weekly wages: $449.90

19. Weekly compensation rate: $299.94 / $299.94

20. Method wages computation: Stipulation

COMPENSATION PAYABLE

21. Amount of compensation payable: None

22. Second Injury Fund liability: N/A

TOTAL: -0-

23. Future requirements awarded: N/A

Said payments to begin N/A and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of N/A of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant:

FINDINGS OF FACT and RULINGS OF LAW:

AWARD

Employee: John Shelton

Dependents: N/A

Employer: Delmar Gardens

Additional Party: N/A

Insurer: Travelers Insurance Company

Hearing Date: September 14, 2009

Injury No.: 06-083797

Before the
Division of Workers' Compensation
Department of Labor and Industrial Relations of Missouri
Jefferson City, Missouri

Checked by: JED:sr

This matter involves two separate and disputed Claims for Compensation each involving the low back with the reported accident dates of August 9, 2006 (#06-083796) and August 14, 2006 (#06-083797). These cases may be referred to hereinafter as the first and second cases, respectively and chronologically. Both parties are represented by counsel.

Issues for Trial

Both Cases

1. Whether injury arose out of and in the course of employment.
2. Failure to take drug/alcohol testing pursuant to Section 287.120.6(3) RSMo (2005).
3. Nature and extent of permanent disability.

Second Case

4. Notice.
5. Accident.
6. Medical causation/Attribution.

FINDINGS OF FACT

The employer and insurer did not dispute that the employee sustained an accident and injury on 08/09/06 but are asserting that he has forfeited benefits under Section 287.120.6(3) for failure to comply with drug or alcohol testing.

The parties stipulated that no compensation had been paid and no medical expenses provided. The only claim being made was for permanent partial disability. The parties further stipulated the average weekly wage of $449.90 and rates of $299.94 for both temporary total and permanent partial disability.

Claimant's Testimony

Mr. Shelton lifted a nursing home resident on 08/09/06 and sustained a back injury. He testified that he reported the matter to his supervisor that evening and a referral was made to Concentra Medical Centers for medical treatment. He, instead, started treatment with the Veterans Administration Hospital. The records of the Veterans Administration Hospital which were admitted into evidence did indicate a visit on 08/13/06 in which he reported low back pain related to lifting at work.

The claimant testified that when he reported the injury, he was referred to Concentra Medical Centers. He claims he was treated inappropriately at Concentra Medical Centers and he refused to be seen by them and refused to have testing for alcohol. He did suggest that he wasn't offered an alcohol test but was offered a drug test. He claimed he refused to undergo the test based on the manner in which he was treated at Concentra.

He testified that he then returned to work and sustained a new injury on or about 08/14/06 while lifting a resident. He testified that he reported the matter to his supervisor. However, the claimant was shown his deposition taken prior to trial and admitted that after reviewing the deposition, he may not have reported this to his supervisor.

The claimant testified that he was referred by the employer and insurer to Concentra Medical Centers. As identified in the records of Concentra Medical Centers, he was seen on 08/18/06. The claimant testified that he was treated inappropriately by the person in charge and that he therefore refused to be treated by them and refused to take a drug or alcohol test. The records of Concentra indicate that he smelled of alcohol and that he did refuse to take an alcohol test. In addition, a certified copy of the Employment Security records were introduced into evidence and those contain a finding that the claimant refused to undergo alcohol testing and was terminated by the employer in connection with his misconduct in that regard. The claimant denied at hearing that he had been drinking. He testified that he sought his own medical care at Veterans Administration Hospital and has been treated by them since the date of accident.

He currently complains of low back pain and takes Hydrocodone. He was terminated by Delmar Gardens on 08/21/06 but has found other employment. He did admit to having sustained a back injury while working at his current place of employment, Veterans Administration Hospital, and also having sustained a low back injury in a motor vehicle accident on an unspecified date since working at Delmar Gardens. He currently uses a cane, takes medication on a regular basis and is unable to engage in the activities that he did prior to 08/09/06.

He was examined at the request of his attorney by Dr. Shawn Berkin on two occasions, 12/05/06 and 09/17/07. At the first examination, the doctor did not believe he was at maximum

medical improvement but diagnosed a lumbosacral strain pertaining to both injuries. When seen by Dr. Berkin on 09/17/07, he was diagnosed with the same condition and rated by Dr. Berkin as having disability of 25% of the body with an apportionment equally between the two injuries. He also found that Mr. Shelton had preexisting disability of 5% of the body related to the low back due to a military service injury in 1968. Dr. Berkin failed to make attribution, if any, to subsequent injuries.

At the request of the employer and insurer, the claimant was examined by Dr. Marvin Mishkin. Dr. Mishkin's report was introduced into evidence and Dr. Mishkin found no evidence of permanent partial disability related to either accident. He did believe he had degenerative disc disease in the lumbar spine but not related to either accident. Dr. Mishkin noticed that he was uncooperative in the examination and constantly stated that he does not remember anything.

The employee's only medical treatment has been though the Veterans Administration Hospital other than for a visit to an emergency room for the residuals of a motor vehicle accident.

Jessica Hayes

On behalf of Employer, Jessica Hayes testified that she is the administrator of the Delmar Gardens location where Mr. Shelton worked. She was not familiar with the injury but did identify the personnel policy of Delmar Gardens that all employees are required to undergo drug/alcohol testing following a work related injury. This is applied regardless of whether the employee is suspected of having sustained a work related injury while under the influence of drugs or alcohol. She identified the document signed by Mr. Shelton at his time of employment indicating that he was aware of post-accident drug testing and that his benefits could be forfeited for refusal (Exhibit 6).

Jeanna Woods

Also testifying on behalf of the employer and insurer was Jeanna Woods. She recalled a conversation with Mr. Shelton on 08/12/06 which was documented in her file. Mr. Shelton contacted her to report having been injured in the shift the prior morning of 08/12/06. He was instructed to go to Missouri Baptist Hospital but indicated he would not do so as he did not have transportation. She subsequently discussed the injury with Mr. Shelton on 08/13/06 and advised him that he should go to Missouri Baptist Hospital or Concentra the following Monday, as Concentra was not open on weekends. Concentra is the authorized medical provider of the employer and insurer. The claimant indicated that he chose instead to go to his own doctor at Veterans Administration Hospital.

Non-Compliance with Drug Testing Section 287.120.6(3) RSMo

The employee did go to Concentra on 08/18/06. According to Mr. Shelton, he was treated rudely at that time. It was reported that Mr. Shelton refused to undergo alcohol testing.

When the report was made to Delmar Gardens, they terminated him pursuant to their personnel policy.

Employers/Insurers Exhibit 3 consisted of the certified copy of the records of Concentra. The records indicate the employee smelled of alcohol and refused to undergo alcohol testing. The employee applied for unemployment benefits and was denied benefits based on a finding that he had refused to undergo alcohol testing and therefore had engaged in post-injury misconduct.

Section 287.120.6(3) was amended effective 08/28/05 to provide that an employee's refusal to take a test for alcohol or a non-prescribed controlled substance, as defined by Section 195.010, RSMo, at the request of the employer shall result in a forfeiture of benefits under this chapter if the employer had sufficient cause to suspect use of alcohol or a non-prescribed controlled substance by the claimant or if the employer's policy clearly authorized post-injury testing.

Conclusion

Accordingly, on the basis of the substantial competent evidence contained within the whole record, in the second case, Employer established its post-injury testing policy and this case falls within the forfeiture provisions of Section 287.120.6(3) RSMo (2005). In addition, Claimant failed to cary his burden of proof that he gave Employer proper notice under Section 287.420 RSMo (2000). Claim denied. The remaining issues are moot.

Date: _____ Made by: _____

JOSEPH E. DENIGAN
Administrative Law Judge

A true copy: Attest:

_____

Division of Workers' Compensation